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Public Prosecutor v Asriadi bin Bakri

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HIGH COURT (KOTA KINABALU) — CRIMINAL CASE NO TWU-45A-2/5 OF 2022
LIM HOCK LENG J
16 FEBRUARY 2024

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Criminal Law — Dangerous drugs — Trafficking — Accused charged under s 39B(1)(a) of Dangerous Drugs Act 1952 for trafficking 64.51g of methamphetamine — Whether prosecution had made out prima facie case against accused — Whether defence casted reasonable doubt on prosecutions case — Dangerous Drugs Act 1952 s 39(B)(1)(a)

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On 6 January 2022 at about 2.05pm, PW3 saw the accused in a suspicious state along the road at Cenderamata Estate Dumpas, Tawau and stopped by his side. PW3 and his team got out of their cars and introduced himself as a policeman by showing his authority card. The accused tried to flee but was apprehended by PW5 after a bit of a scuffle. PW5 handcuffed the accused and also carried out a body search on the accused on the instructions of PW3. Two plastic packets containing crystallite substance suspected to be drugs wrapped in a blue plastic bag was found in the right pocket of the blue short pants worn by the accused. The accused was then charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking 64.51g of methamphetamine. In defence, it was stated that there was no evidence of any attempt by the accused to run away. The defence submitted that it was put to PW3 that it was illogical the accused could have walked to Ladang Cenderamata where he was arrested and there was a possibility the drug exhibits were found on the undisclosed motorcycle used by the accused. The accused had told PW3 at the time of his arrest that the motorcycle belonged to a person called Jalak.

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Held, convicting the accused on the charge:

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(1) There was no reasonable doubt casted on the correctness of the tests to ascertain the identity of the drugs and any concern over the calibration of the weighing scale was dispelled by the chemist's uncontradicted testimony. The prosecution's case against the accused was premised on actual possession, that is, the accused had custody and control, as well as knowledge of the drugs, since the drugs were found in two plastic packets wrapped in a blue plastic bag found in the right pocket of the blue short pants worn by the accused at the time of his arrest. Once there was a finding of actual possession of methamphetamine meeting the threshold

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quantity of 50g, 'the statutory presumption of trafficking under s 37(da)(vi) must come into play' (see paras 34 & 40–41).

(2) Short of an adverse admission or material discrepancy by a witness undermining the prosecution's case, the putting of the defence was not evidence. For the alleged motorcycle, there was no or insufficient evidential basis to even suppose that it or Jalak (the supposed owner) existed. In view of the direct evidence of PW3 and PW5, there was no merit in the defence submission that the absence of fingerprints and photographs exculpated the accused. The submission that there was a break in the chain of evidence since PW3 did not mark the drug exhibits at the scene of arrest was unmeritorious. There was no discernible evidence of motive or reason to frame the accused. Further, there was no discernible evidence that the drug exhibits had been tampered with. The prosecution had made out a prima facie case against the accused in respect of the identity and weight of the drugs and actual possession which triggered the statutory presumption of trafficking. The accused was accordingly ordered to enter his defence (see paras 48, 50, 52, 58, 59, 61 & 65).

(3) There were no specific details as might lead the court to believe in Jalak's existence or to constitute an Alcontara notice which would enable investigations to be carried out even if one to assume that the accused had told the police of Jalak shortly after his arrest. As Jalak was a fictional character, the defence of innocent carrier which the accused alluded to did not avail him. There was no explanation as to why 'Jalak' would have the accused deliver a motorcycle for him, or why 'Jalak' could not have delivered it himself. There was no good reason to disbelieve the evidence of PW3, the investigation officer and PW5, more so as the discovery of the drugs in the accused's shorts was consistent with the seizure list and the police report. The accused's narrative was incredulous and did not cast any reasonable doubt on the prosecution's evidence (see paras 77, 79–81 & 84).

(4) The accused was sentenced to a term of life imprisonment which was defined as 30 years under s 3 of the Criminal Justice Act 1953 and 12 strokes of whipping. The sentence was ordered to run from the date of arrest and the accused was to be referred to the immigration authorities upon completion of his sentence as he was not a Malaysian citizen and did not have the right of abode in this country (see paras 89–90).

[Bahasa Malaysia summary

Pada 6 Januari 2022 kira-kira jam 2.05 petang, PW3 ternampak tertuduh dalam keadaan mencurigakan di sepanjang jalan di Ladang Cenderamata Dumpas, Tawau dan berhenti di sisinya. PW3 dan pasukannya keluar dari kereta mereka dan memperkenalkan dirinya sebagai anggota polis dengan

menunjukkan kad kuasanya. Tertuduh cuba melarikan diri tetapi berjaya ditahan PW5 selepas berlaku sedikit pergelutan. PW5 menggari tertuduh dan turut melakukan pemeriksaan badan ke atas tertuduh atas arahan PW3. Dua peket plastik berisi bahan ketulan hablur jernih disyaki dadah yang dibungkus dalam beg plastik biru ditemui di dalam poket kanan seluar pendek biru yang dipakai tertuduh. Tertuduh kemudian didakwa mengikut s 39B(1)(a) Akta Dadah Berbahaya 1952 kerana mengedar 64.51g methamphetamine. Dalam pembelaan, ia menyatakan bahawa tiada keterangan sebarang percubaan oleh tertuduh untuk melarikan diri. Pihak pembelaan berhujah bahawa ia telah dimaklumkan kepada PW3 bahawa adalah tidak logik tertuduh boleh berjalan ke Ladang Cenderamata di mana dia ditahan dan ada kemungkinan ekshibit dadah ditemui pada motosikal yang tidak didedahkan yang digunakan tertuduh. Tertuduh telah memberitahu PW3 ketika ditahan bahawa motosikal itu milik seorang bernama Jalak.

Diputuskan, mensabitkan tertuduh dengan pertuduhan:

(1) Tiada keraguan munasabah terhadap ketepatan ujian untuk memastikan identiti dadah dan sebarang kebimbangan terhadap penentukuran penimbang telah dihilangkan oleh keterangan ahli kimia yang tidak bercanggah. Kes pendakwaan terhadap tertuduh adalah berdasarkan milikan sebenar, iaitu, tertuduh mempunyai hak penjagaan dan kawalan serta pengetahuan tentang dadah itu memandangkan dadah itu ditemui dalam dua peket plastik yang dibungkus dalam beg plastik berwarna biru yang terdapat di dalam poket kanan seluar pendek biru yang dipakai tertuduh semasa dia ditangkap. Sebaik sahaja terdapat dapatan milikan sebenar methamphetamine yang menepati kuantiti ambang 50g, 'anggapan statutori pengedaran di bawah s 37(da)(vi) harus terpakai' (lihat perenggan 34 & 40–41).

(2) Tanpa pengakuan bertentangan atau percanggahan material oleh saksi yang menjejaskan kes pendakwaan, pengemukaan pembelaan bukanlah keterangan. Bagi motosikal yang didakwa itu, tiada atau tidak cukup asas keterangan untuk mengandaikan bahawa ia atau Jalak (yang dikatakan pemilik) wujud. Memandangkan keterangan langsung PW3 dan PW5, tiada merit dalam hujahan pembelaan bahawa ketiadaan cap jari dan gambar membebaskan tertuduh. Penghujahan bahawa terdapat putusnya rantaian keterangan kerana PW3 tidak menandakan ekshibit dadah di tempat tangkapan adalah tidak bermerit. Tiada keterangan jelas motif atau alasan untuk memerangkap tertuduh. Tambahan pula, tiada keterangan yang boleh dilihat bahawa ekshibit dadah telah diusik. Pihak pendakwaan telah membuktikan kes prima facie terhadap tertuduh berhubung dengan identiti dan berat dadah serta milikan sebenar yang mencetuskan anggapan statutori pengedaran. Tertuduh telah diperintahkan untuk membela diri (lihat perenggan 48, 50, 52, 58, 59, 61 & 65).

(3) Tiada butiran khusus yang mungkin menyebabkan mahkamah mempercayai kewujudan Jalak atau membentuk notis Alcontara yang membolehkan penyiasatan dijalankan walaupun seseorang itu menganggap bahawa tertuduh telah memberitahu polis Jalak sejurus selepas penahanannya. Memandangkan Jalak adalah watak fiksyen, pembelaan pembawa tidak bersalah yang didakwa tertuduh tidak terpakai kepadanya. Tiada penjelasan mengapa 'Jalak' mahu tertuduh menghantar motosikal untuknya, atau mengapa 'Jalak' tidak boleh menghantarnya sendiri. Tiada alasan kukuh untuk tidak mempercayai keterangan PW3, pegawai penyiasat dan PW5, lebih-lebih lagi penemuan dadah dalam seluar pendek tertuduh adalah konsisten dengan senarai rampasan dan laporan polis. Naratif tertuduh adalah tidak dipercayai dan tidak menimbulkan sebarang keraguan munasabah terhadap keterangan pihak pendakwaan (lihat perenggan 77, 79–81 & 84).

(4) Tertuduh dijatuhkan hukuman penjara seumur hidup yang ditakrifkan sebagai 30 tahun di bawah s 3 Akta Keadilan Jenayah 1953 dan 12 sebatan. Hukuman itu diperintahkan berjalan dari tarikh tangkap dan tertuduh hendaklah dirujuk kepada pihak imigresen selepas selesai menjalani hukuman kerana dia bukan warganegara Malaysia dan tidak mempunyai hak untuk tinggal di negara ini (lihat perenggan 89–90).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Ariff Arhannan bin Che Udin v PP [2022] 3 MLJ 157, FC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Dickson Levy a/l Maria George v PP [2018] MLJU 98; [2018] CLJU 135; [2018] 1 LNS 135, CA (refd)
Ghasem Hozouri Hassan v PP [2019] 6 MLJ 231; [2018] 6 CLJ 133, FC (refd)
Goh Han Heng v PP [2003] 4 SLR 374, HC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Mahendran a/l Arivalan v PP [2020] MLJU 1286; [2020] CLJU 1278; [2020] 1 LNS 1278; [2020] MLRAU 279, CA (refd)
Megat Halim bin Megat Omar v Pendakwa Raya [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)
Mirza Murtala v PP [2010] 5 MLJ 616; [2010] 4 CLJ 150, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
PP v Ali [1962] 1 MLJ 257; [1962] CLJU 129 (refd)
PP v Cawthamen a/l Mathevan and another case [2021] MLJU 813; [2021] CLJU 728; [2021] 1 LNS 728, HC (refd)
PP v Mohamed Ali [1962] 1 MLJ 257 (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Muhamad Nasir bin Shaharudin & Anor [1994] 2 MLJ 576; [1992] CLJU 8; [1992] 1 LNS 8, HC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
PP v Raymond ak Patrick [2016] 8 MLJ 46, HC (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599; [2010] 6 CLJ 121, FC (refd)
Qui Jieru v PP and another appeal [2020] MLJU 821; [2020] CLJU 744; [2020] 1 LNS 744, CA (refd)
Sahrul Mazlee bin Mohd Khalid v PP [2022] 3 MLJ 919; [2022] CLJU 4; [2022] 1 LNS 4, CA (refd)
Sri Ganesh a/l Jaya Balan v PP and other appeals [2021] MLJU 2642, CA (refd)
The Prosecution v Ang Yue Suien [2011] MLJU 225, HC (refd)
Yu Jing v PP [2017] MLJU 324; [2017] CLJU 315; [2017] 1 LNS 315, CA (refd)

Legislation referred to

Criminal Justice Act 1953 s 3
Criminal Procedure Code s 182A(1)
Dangerous Drugs Act 1952 ss 37, 37(da)(vi), 39B(1)(a), First Schedule

Hurman Hussain (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Jhasarry Kang (Kang Advocates) for the accused.

Lim Hock Leng J:

THE CHARGE

[1] The accused was charged with trafficking 64.51g of methamphetamine.

[2] The charge preferred against him reads as follows:

> Bahawa kamu pada 06 Januari 2022 jam lebih kurang 2.05 petang, bertempat di kawasan Cenderamata Estate Dumpas, dalam daerah Tawau, dalam Negeri Sabah, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 64.51 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 [Akta 234] yang boleh dihukum dibawah seksyen 39B(2) Akta yang sama.

THE PROSECUTION'S NARRATIVE

[3] On 6 January 2022, at about 11.10am, Insp Idrus bin Ibrahim ('PW3'), acting on a tip-off, told D/Sub-Insp Sabturani bin Maul ('PW5') to assemble a narcotics department team for a briefing.

A **[4]** At noon, PW3 briefed the team which comprised PW5, D/Sjn Eddy, D/Sjn Mansor, D/Kpl Royton, D/Kpl Muliady, D/Kpl Jasrin, D/Kpl Hediansah, Kpl Luizin, D/L/Kpl Zurain, and L/Kpl Nasyrah.

B **[5]** At 12.45pm, PW3 and his team left the narcotics department in three cars to proceed to Cenderamata Estate Dumpas, Tawau. PW3, PW5, and D/Kpl Muliady were in the lead car driven by L/Kpl Nasyrah.

C **[6]** At about 2.05pm, PW3 saw the accused in a suspicious state along the road there and asked L/Kpl Nasyrah to accelerate towards the accused and to stop by his side. PW3 gave evidence that 'saya melihat OKT berada bersendirian dan mundar mandir di (k)awasan tersebut tanpa membawa sebarang peralatan untuk pekerjaan kebun'.

D **[7]** PW3 and his team got out of their cars. PW3 introduced himself as a policeman by showing his authority card.

[8] The accused tried to flee but was apprehended by PW5 after a bit of a scuffle.

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[9] PW5 handcuffed the accused and also carried out a body search on the accused on the instructions of PW3.

F **[10]** In PW3's words: 'Hasil pemeriksaan, D/SI Sabturani telah menjumpai satu bungkusan plastik warna biru di dalam poket kanan seluar pendek warna biru yang dipakai oleh lelaki itu'.

[11] PW3 went on to testify: 'Pemeriksaan lanjut ke atas bungkusan plastik** G biru yang dibuat oleh D/SI Sabturani telah menjumpai dua paket plastik lutsinar berisi bahan ketulan hablur jernih disyaki dadah jenis syabu. Kami seterusnya membawa tangkapan dan rampasan ke Pejabat BSJND Tawau untuk tindakan lanjut'.

H **[12]** PW3 listed the items seized in the *borang senarai bongkar* ('P14'). He testified that the drug exhibits were under his control on the journey back to the narcotics department office, in the same car with the accused. On arrival, he weighed, marked and dated the drug exhibits.

I **[13]** PW3 lodged a police report on the arrest and seizure. He did so at 5.09pm on the same day, that is, 6 January 2022. The police report was marked as P13(1–2).

[14] Shortly thereafter, PW3 handed over the accused and the drug exhibits to the investigation officer, Insp Syed Muhammad Iqbal bin Syed Yassin ('PW4') at about 5.15pm. PW3 also handed over P13(1–2) and P14 to PW4 who orally confirmed the handover when he gave evidence. The handover was also documented in P15 which was signed off by both PW3 and PW4.

[15] PW4 testified that he added his own markings on the drug exhibits, that is, 'S1' on the blue plastic bag, and 'S2' and 'S3' on the two transparent packets containing crystalline substances suspected to be drugs.

[16] At the trial, these were marked as exhs P6, P7 and P8 respectively.

[17] PW4 testified that he placed the drug exhibits and the blue shorts P12 — which the accused was wearing at the time of the arrest in which the drug exhibits were found — in a metal cupboard to which he alone had the key.

[18] The next day, PW4 took out the drug exhibits for photographs to be taken. After the photographs P16(1–4) were taken, they were placed in the metal cupboard to which he alone had the key.

[19] He had placed the drug exhibits in an envelope which he marked 'S1' to which was affixed the PDRM 545 seal ('P5').

[20] D/Sjn Awang ('PW2') was entrusted to hand over P5 to the Jabatan Kimia in Kota Kinabalu.

[21] On 13 January 2022, at 10.40am, PW2 handed over P5 together with the Pol 31 form for chemical analysis ('P4') to the chemist Rita Tie Ung Ha ('PW1') who gave evidence on the delivery.

[22] PW1 confirmed that she issued the receipt with the Jabatan Kimia unique serial number 22-FR-S-00163 which was marked at the trial as P3.

[23] PW4 testified that he collected P5 (sealed with the Jabatan Kimia label and bearing the unique serial number 22-FR-S-00163) from PW1 on 1 April 2022 at about 11am. PW4 also collected three copies of the chemist report, P10, from PW1 whose evidence was confirmatory.

A THE COURT'S DUTY AT THE CLOSE OF THE PROSECUTION'S CASE

[24] At the close of the prosecution's case, the court has a duty to subject the evidence to maximum evaluation in order to determine whether a prima facie case has been made out against the accused which requires him to enter his defence. See *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85.

[25] A prima facie case can be said to be established where the prosecution has adduced such evidence of the essential elements of the charge as are sufficient to convict the accused, if he were to keep silent, and the evidence is left unexplained or unrebutted.

[26] In *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 , the Court of Appeal formulated the test thus:

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

EVALUATION OF THE PROSECUTION'S CASE

[27] To make out its case against the accused, the prosecution had to establish:

(a) the identity and weight of the drugs, viz, 64.51g of methamphetamine;

(b) the accused had possession of the drugs; and

(c) the accused was trafficking the drugs on the date, and at the time and place as particularised in the charge.

Identity and weight of the drugs

[28] To prove the identity and weight of the drugs seized, the prosecution called PW1 whose academic credentials include a Bachelor's, and Master's degree in Science (Forensic Science) from the University of Science Malaysia.

[29] PW1 testified that she had been in the service of Jabatan Kimia Malaysia since 18 July 2005, and that she had attended various courses, seminars, conferences and workshops on the analysis of dangerous drugs and related subjects.

[30] She averred that she had analysed various kinds of dangerous drugs under the Dangerous Drugs Act 1952, including methamphetamine, and that she had testified on more than 200 occasions in court without any adverse comments.

[31] PW1 identified the sealed envelope P5 and the contents P6, P7, and P8, as well as the receipt she had issued ('P3') bearing the unique serial number. PW1 confirmed that she had set out her findings in her report P10.

[32] As for the identity of the drugs, PW1 carried out the Marquis and Simon's tests. She also carried out an analysis using the Gas Chromatography-Mass Spectrometer ('GC-MS'), as well as an analysis using the Gas Chromatography-Flam Ionization Detector ('GC-FID'). She ascertained that there was a nett weight of 64.51g of methamphetamine in the crystalline substances found in the two transparent plastic packets.

[33] PW1 testified that methamphetamine is a dangerous drug listed in the First Schedule of the Dangerous Drugs Act 1952.

[34] While PW1 was cross-examined as to how she carried out the tests to ascertain the identity of the drugs and the weighing scale was calibrated, there was no reasonable doubt cast on the correctness of the tests and any concern over the calibration of the weighing scale was dispelled by PW1's uncontradicted testimony that '(t)he balance will be calibrated each time before I start the weighing process'.

[35] Moreover, PW1 explained that there could be no mix-up because she would only analyse one sample at a time before opening up another package or another case.

[36] PW1's expert evidence was not in the least affected.

Possession

[37] In order to prove possession, the prosecution had to prove that: (a) the accused had knowledge of the drugs; and (b) that he had some form of control or custody of the drugs.

[38] As was held in *Public Prosecutor v Muhamad Nasir bin Shaharudin & Anor* [1994] 2 MLJ 576; [1992] CLJU 8; [1992] 1 LNS 8: 'To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA'.

[39] The meaning of custody and control has been explained by Raus Sharif CJ in *Ghasem Hozouri Hassan v Public Prosecutor* [2019] 6 MLJ 231; [2018] 6 CLJ 133 thus:

> ... when we talk about the issue of custody and control, what is crucial is that the accused must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had *animus possidendi*).

[40] The prosecution's case against the accused was premised on actual possession, that is, the accused had custody and control, as well as knowledge of the drugs, since the drugs were found in two plastic packets ('P7' and 'P8') wrapped in a blue plastic bag ('P6') found in the right pocket of the blue short pants ('P12') worn by the accused at the time of his arrest. Knowledge may be inferred from the fact that the accused had the drugs in his shorts, and also from his futile attempt to escape and the scuffle. See *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19.

Trafficking

[41] Once there is a finding of actual possession of methamphetamine meeting the threshold quantity of 50g, 'the statutory presumption of trafficking under s 37(da)(vi) must come into play'. See the decision of the Federal Court in *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121. See also the decision of the Federal Court in *Ariff Arhannan bin Che Udin v Public Prosecutor* [2022] 3 MLJ 157, paras 13–15.

ISSUES RAISED BY THE DEFENCE AT THE CLOSE OF THE PROSECUTION'S CASE

[42] The defence raised various issues to argue that the prosecution had failed to make out a prima facie case against the accused at the close of its case.

[43] The defence stated there was no evidence of any attempt by the accused to run away. That is not correct in the light of PW3's evidence: 'Lelaki itu cuba untuk melarikan diri namun berjaya ditangkap setelah berlaku sedikit pergelutan'. See WSPW3, para 6. Further, PW5, who was also at the scene, gave evidence that '(s)emasa cuba dihampiri, OKT telah melarikan diri', and '(k)ami mengejar dan berjaya menangkap OKT'. See NOP, Q & A 209–210.

[44] The defence submitted that it was put to PW3 and PW5 that that it was illogical 'the accused could have used motorcycle traveled into Ladang Cenderamata in view of the long journey', (NOP, pp 51–52) and it was put to PW3 that it was illogical the accused could have walked to Ladang Cenderamata where he was arrested.

[45] The defence also submitted that it was put to PW3 that there was a possibility the drug exhibits were found on the undisclosed motorcycle used by the accused. The accused had told PW3 at the time of his arrest that the motorcycle belonged to a person called Jalak.

[46] It was also put to the prosecution witnesses that there was inconsistency in the prosecution evidence.

[47] In putting across its case to the prosecution witnesses that the accused did not attempt to run away or that there was a motorcycle at the scene and so on, learned counsel for the accused was doing no more than avoiding any suggestion — if such defences were to be raised when the accused took the stand in the event the court called for his defence to be entered — that these are simply afterthoughts. See *Megat Halim bin Megat Omar v Pendakwa Raya* [2008] MLJU 647; [2009] 1 CLJ 154.

[48] Short of an adverse admission or material discrepancy by a witness undermining the prosecution's case, the putting of the defence is not evidence. Were it otherwise, every accused would be discharged and acquitted merely by the defence counsel throwing 'put' questions at the prosecution witnesses.

[49] In *Mirza Murtala v Public Prosecutor* [2010] 5 MLJ 616; [2010] 4 CLJ 150 , the Court of Appeal held that it is a 'trite principle of law that suggestions made to the prosecution's witnesses at the prosecution's stage by the defence are not evidence and remains (sic) mere suggestions'. See also *Yu Jing v Public Prosecutor* [2017] MLJU 324; [2017] CLJU 315; [2017] 1 LNS 315.

[50] As for the alleged motorcycle, there was no or insufficient evidential basis to even suppose that it or Jalak (the supposed owner) exists. It was submitted that the accused had told PW3 that the alleged motorcycle belonged to Jalak, though PW3 answered 'tidak pasti'. See NOP, Q & A 106. Even if the accused had so informed PW3, such a scenario does not on its own mean that Jalak and the motorcycle actually exist.

[51] It is not the prosecution's case that they had kept the accused under surveillance from the morning and followed him to the scene where he was arrested. How the accused arrived at the crime scene, whether he got a lift from someone or walked, that was not what the prosecution had to prove. He was

A spotted in the Ladang Cenderamata area and arrested with the drugs in the right pocket of his blue short pants. That does not necessarily mean that he got there with the drugs placed in the front bucket of a motorcycle. The 'put' question does not alter or contradict PW3 and PW5's direct evidence that P6, P7, and P8 were found in P12 which he was wearing at the time of arrest, more so when these eyewitnesses credibly denied the existence of a motorcycle at the scene. PW3 testified that the accused was on his own when observed and when arrested.

C **[52]** In view of the direct evidence of PW3 and PW5, there is no merit in the defence submission that the absence of fingerprints and photographs exculpates the accused.

D **[53]** Fingerprints (see *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560) and photographs (see *Public Prosecutor v Cawthamen a/l Mathevan and another case* [2021] MLJU 813; [2021] CLJU 728; [2021] 1 LNS 728) are only corroborative evidence or useful when identity is in doubt. Direct evidence of the circumstances leading to the discovery of the drugs by eyewitnesses such as PW3 and PW5 suffice, unless there is room for reasonable E doubt on a material aspect.

F **[54]** These authorities put to rest the defence contention that while PW3 took a photograph of PW5 making a search on the accused, PW3 did not take a photograph of the blue plastic bag before it was opened by PW3. It was submitted there was a danger of tampering. Yet the seizure list P14 shows that the blue plastic bag was found with the two plastic packets containing the crystalline substances/drugs and the accused affixed his thumbprint on P14.

G **[55]** On a side note, PW5 was called to give evidence as to what happened to the photograph taken by PW3 using PW5's handphone. PW5 explained that the photograph could not be produced because his telephone fell into water when he was on another operation.

H **[56]** If at all further support is needed, reference may be made to *Mahendran a/l Arivalan v Public Prosecutor* [2020] MLJU 1286; [2020] CLJU 1278; [2020] 1 LNS 1278; [2020] MLRAU 279, where Nordin Hassan JCA (as His Lordship then was) explained:

I > ... it is trite that forensic evidence including DNA or fingerprints only serves as corroborative evidence. It certainly assist(s) the prosecution to establish its case beyond reasonable doubt as required under the law. However, the absence of forensic evidence does not mean that the prosecution case must collapse if there are other cogent evidence to establish its case in particular direct evidence such as in the present case.

[57] Learned counsel for the accused referred to several cases to contend that fingerprint evidence was essential in this case, but it is axiomatic that each case is decided on its own facts. For example, although the accused in *Public Prosecutor v Raymond ak Patrick* [2016] 8 MLJ 46 was acquitted and discharged at the end of the prosecution's case, it was because there was plausible evidence that PW9 was the trafficker and either the accused or PW9 could have been the one who smoked the cigarette, which butt was found at the crime scene. In the instant case, there was no one else seen at the scene and the drugs were found in the accused's shorts. The defence also relied on *The Prosecution v Ang Yue Suien* [2011] MLJU 225, where the accused was arrested while sitting in the driver's seat in a car. On the front passenger seat was a paper bag containing the subject drugs. The car did not belong to the accused but to PW4. In that case, the police made no attempt to locate Ah Mei, PW4's girlfriend, who had the use of the car prior to the accused driving it. David Wong J (as His Lordship then was) also found it significant that the paper bag was conspicuously placed on the front passenger seat instead of being concealed. It can be seen that there were reasonable doubts as to the identity of the person having possession of the paper bag, and fingerprint evidence would have been useful. In the instant case, there is no plausible evidence that another person was involved, save for Jalak about whom there is insufficient evidential basis to even suppose that he exists.

[58] Another issue raised for the accused was that there was a break in the chain of evidence since PW3 did not mark the drug exhibits at the scene of arrest. It was submitted that the 'drug exhibits could have (been) tampered along the way before it reached to PW4 at Pejabat Siasatan Jenayah Narkotik IPD Tawau'.

[59] The submission is unmeritorious. PW3 in fact testified that he did not know the accused before he was arrested. There was no discernible evidence of motive or reason to frame the accused. In this regard, reference may be made to *Dickson Levy a/l Maria George v Public Prosecutor* [2018] MLJU 98; [2018] CLJU 135; [2018] 1 LNS 135, where the Court of Appeal, citing the Singapore case of *Goh Han Heng v Public Prosecutor* [2003] 4 SLR 374, was of the view that: 'the accused must adduce sufficient evidence of this motive so as to raise a reasonable doubt in the prosecution's case. Only then would the burden of proof shift to the prosecution to prove that there was no such motive. To hold otherwise would mean that the prosecution would have the burden of proving a lack of motive to falsely implicate the accused in literally every case, thereby practically instilling a lack of such a motive as a constituent element of every offence.

[60] Moreover, PW3 testified that the drug exhibits were under his control on the journey back to his office, in the same car with the accused. In *Public*

Prosecutor v Ali [1962] 1 MLJ 257; [1962] CLJU 129, Thomson CJ held: '...When a Police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of things we all see every day in our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent improbability the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, should normally be accepted ...'.

[61] The defence also contended that there is 'a possibility of break of chain of evidence in which exhibits could have been tempered (sic) since PW4 received the exhibits from PW3 on 6 January 2022 at around 5pm'. However, there is no evidence to suppose that at some point from 2.05pm, the time of arrest, until 5pm that the drug exhibits were tampered with. PW3 gave evidence that he issued the seizure list P14, and the drug exhibits were with him in the same car with the accused on the journey back to his office where he weighed and marked the drug exhibits. He also lodged his police report on the arrest and seizure of the drug exhibits. The handover list P15 was prepared. PW3 identified his markings during the trial as well as his signatures thereon (NOP, Q & A 71–74), and PW4 followed suit (NOP, Q & A 152–155). Within that short period of a few hours, there was no discernible evidence that the drug exhibits had been tampered with.

[62] The defence also alluded to the possibility of a break in the chain of evidence for the period 6–12 January 2022 when the drug exhibits were kept in the steel cupboard to which only PW4 had the key; for the period 1 April 2022–6 July 2022, after the crystalline substances had been analysed, when the drug exhibits were again kept in the steel cupboard to which only PW4 had the key. There was no evidence or even suggestion that someone else could access the steel cupboard.

[63] It is not every doubt or possibility, as seems to be suggested by the defence, that amounts to a reasonable doubt. In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, a reasonable doubt was described by the Federal Court as 'a doubt in respect of which a substantial reason can be given' and is not of a fleeting or capricious nature.

[64] In *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16, Sharma J cited with approval the following definition of 'reasonable doubt':

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

[65] Having subjected the evidence at the close of the prosecution's case to maximum evaluation, the court found that the prosecution had made out a prima facie case against the accused in respect of the identity and weight of the drugs and actual possession which triggered the statutory presumption of trafficking. The accused was accordingly ordered to enter his defence.

THE DEFENCE AND EVALUATION OF THE EVIDENCE IN ITS ENTIRETY

[66] The accused elected to give evidence on oath. There was no other witness for the defence.

[67] On 6 January 2022, the accused received a call at about 9am from his close friend ('macam abang angkat') Jalak who often helped him in times of difficulty. They had stayed in the same house in Merotai for two years.

[68] The accused was asked to send a motorcycle to Jalak's customer, Acok.

[69] After Jalak's call, a person named Arsad took him on a motorcycle from the workers' quarters of Sime Darby to Sekolah Menengah Table to meet Jalak at about 9.30am.

[70] On arrival, he saw Jalak inside a car. There was also a red Honda motorcycle. Jalak asked him to deliver the motorcycle to his customer Acok at Cenderamata Estate Dumpas, for which he would be paid RM300.

[71] Continuing with his narrative, the accused said he then rode the red Honda motorcycle to Cenderamata Estate Dumpas. Arsad accompanied him on another motorcycle. They arrived at the gate of the estate at about 11am. Arsad then told him to proceed inside, while Arsad would wait by the gate as the road was 'berbatu dan tidak rata'.

[72] The accused said he rode the red Honda motorcycle for an hour inside the estate on his own. At about 12.30pm, he stopped and had a smoke. He said that suddenly, two policemen pointed pistols at his head. He said he did not have time to run, and he was punched twice in his face as a result of which his mouth bled. He was then handcuffed.

[73] In the words of the accused: 'Selepas ditumbuk, saya baru ditanya mana barang salah itu. Motorsikal saya sudah jatuh, empat orang polis memperiksa motorsikal. Salah satu polis ada nampak satu plastik biru di tempat bakul hadapan motorsikal. Plastik biru itu terus dibawa ke depan saya, plastik biru disimpan dalam poket seluar saya. Selepas itu saya diambil gambar dengan muka saya di hadapan. Saya sudah panik dan tidak tahu jam berapa pada masa tersebut'.

[74] The accused further said in his witness statement WSDW1: 'Selepas digambar, saya rasa ketua operasi berbadan gemuk 'dia cakap ini barang Jalak punya' dan selepas itu terus saya dimasukan ke dalam kereta. Saya nampak motorsikal itu dibawa atas kereta double cap silver'.

[75] In evaluating the accused's narrative, the court is bound to consider the alleged existence of Jalak, Acok (the customer) and Arsad who accompanied the accused on a large part of the journey to deliver the Honda motorcycle. The accused sought to explain in re-examination that he had never met Acok. He said that 'Arsad' and 'Acok' were names mentioned by Jalak. Nonetheless, the names 'Acok' and 'Arsad' were not put to any of the police witnesses.

[76] It is pertinent that the accused considered Jalak an 'abang angkat', testified they had even stayed together in a house in Merotai for two years, and gave various details of Jalak such as his occupation as a lorry driver, his race (Bugis) and age (36 years old), his marital status and the name of his wife (Mariam). The accused testified that Jalak originated from Indonesia and was now in Sulawesi.

[77] Yet, during the trial, the accused did not provide the full name, handphone number, or the address of the house in Merotai where he and Jalak allegedly lodged together. There were no specific details as might lead the court to believe in Jalak's existence or to constitute an *Alcontara* notice which would enable investigations to be carried out even if one to assume that the accused had told the police of Jalak shortly after his arrest.

[78] In *Qui Jieru v Public Prosecutor and another appeal* [2020] MLJU 821; [2020] CLJU 744; [2020] 1 LNS 744, Abu Bakar Jais JCA (as His Lordship then was), in delivering the judgment of the Court of Appeal, held:

> ... the appellant only mentioned the name of Daymen and Stanly a day after being arrested when her cautioned statement was recorded. She did not give these names when she was first arrested. Besides no full names of the two gentlemen were given but only their first name. That obviously would not constitute a valid 'Alcontara notice'. It can only be fairly deduced without the full names and more details about Daymen and Stanly, there is not much investigation that can be done in respect of both.

[79] Instead, the accused gave various general descriptions of Jalak. If indeed, they had been as close as suggested, the accused would — at the very least — have been able to tell the court the full or real name of Jalak. As Jalak is a fictional character, the defence of innocent carrier which the accused alluded to does not avail him. It falls at the first hurdle.

[80] Further, as pointed out by the prosecution, there was no explanation as to why 'Jalak' would have the accused deliver a motorcycle for him, or why 'Jalak' could not have delivered it himself.

[81] Furthermore, the accused alluded to a set-up by the police when the undisputed evidence was that they did not know each other before the accused was arrested on 6 January 2022. Neither was there any discernible motive or reason to frame the accused by suppressing the evidence of the red Honda motorcycle or by taking the drugs out from its front basket to plant them in the accused's shorts. There is no good reason to disbelieve the evidence of PW3, PW4 and PW5, more so as the discovery of the drugs in the accused's shorts is consistent with the seizure list and the police report.

[82] In *Sahrul Mazlee bin Mohd Khalid v Public Prosecutor* [2022] 3 MLJ 919; [2022] CLJU 4; [2022] 1 LNS 4, the appellant's defence to the first amended charge was that he was not holding the plastic bag with the drugs in it. SD2 testified that he did not see the appellant carrying anything when coming out of the house. SD2 said that he saw the plastic bag containing the drugs on the roof of a Viva car. However, the leader of the raiding team SP8 was found to be a credible witness who was steadfast in his testimony. The Court of Appeal found no reason to interfere with the finding by the trial judge in relation to the first amended charge as follows: '… during the course of evidence I did not find anything that suggested that any members of the raiding party knew the accused or vice versa so that would exclude any obvious motive on the part of the police raiding party to want to frame up the accused by giving evidence that the accused was carrying the white plastic package seized from his hand when he was in fact not doing so'.

[83] It is also noteworthy that in *Sri Ganesh a/l Jaya Balan v Public Prosecutor and other appeals* [2021] MLJU 2642, Ravinthran Paramaguru JCA, in delivering the judgment of the Court of Appeal, held: 'Whilst we acknowledge that frame up of innocent citizens by the police cannot be discounted in some cases, the court must give weight to that defence only on credible evidence that suggests it and not on mere speculation; otherwise prosecution of criminal cases in this country would be frustrated at every turn (see *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257)'.

[84] In the upshot, the accused's narrative is incredulous and does not cast any reasonable doubt on the prosecution's evidence.

CONCLUSION

[85] After evaluating all the evidence in line with s 182A(1) of the Criminal Procedure Code, the court is driven to conclude that the prosecution has proven its case beyond reasonable doubt in relation to the essential elements of the charge, viz, the identity and weight of the drugs as well as actual possession which triggered the statutory presumption of trafficking.

[86] The accused failed to rebut the statutory presumption of trafficking on a balance of probabilities, and to cast reasonable doubt on the prosecution's case in other material respects.

[87] The accused was accordingly convicted on the charge preferred against him under s 39B(1)(a) of the Dangerous Drugs Act 1952.

[88] The prosecution did not press for the death sentence. Learned counsel for the accused urged the court not to impose the death sentence as the quantity of the drugs was just marginally above the threshold, and the accused was a first offender.

[89] In exercising its discretion not to impose the death sentence, the court sentenced the accused to a term of life imprisonment which is defined as 30 years under s 3 of the Criminal Justice Act 1953. The sentence was ordered to run from the date of arrest, that is, 6 January 2022. It was further ordered that the accused is to undergo the minimum 12 strokes of whipping.

[90] Lastly, it was ordered that the accused is to be referred to the immigration authorities upon completion of his sentence as he is not a Malaysian citizen and does not have the right of abode in this country.

Accused convicted on charge.

Reported by Ahmad Ismail